BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KIMBERLY STARKS Claimant VS. **U.S.D. 308** Respondent AND **HARTFORD FIRE INSURANCE CO.** Insurance Carrier	)	Docket No. 1,060,513

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the April 15, 2013, Award entered by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on August 23, 2013. Scott J. Mann of Hutchinson, Kansas, appeared for claimant. P. Kelly Donley of Wichita, Kansas, appeared for respondent.

The ALJ found claimant's average weekly wage is the sum of two aggregated part-time positions held by claimant on the date of the accident. Based upon this wage finding, the ALJ determined claimant was paid temporary total disability benefits at an incorrect rate. Additionally, the ALJ found claimant suffered a 39.5 percent wage loss as a result of her injury and suffered a 66.75 percent task loss as a result of her injury. The ALJ also found claimant sustained a 5 percent functional impairment to the body as a whole. Compensation was awarded in favor of claimant based upon a 53 percent work disability. Further, the ALJ found claimant is entitled to medical expenses, unauthorized medical expenses, and future medical treatment upon proper application.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues the Award should reflect claimant's average weekly wage as that earned only at respondent. Additionally, respondent argues that because claimant's

post-injury earning exceeds her pre-injury average weekly wage, claimant is not entitled to work disability benefits and is limited in her award. In the alternative, should it be found claimant is entitled to work disability benefits, respondent contends claimant sustained a 100 percent wage loss and 56.5 percent task loss, for a 78.25 percent work disability.

Claimant argues her wages should be aggregated as she performed "the same or a very similar type of work" with both employers as stated in K.S.A. 2009 Supp. 44-511(b)(7). Additionally, claimant contends with the aggregated average weekly wage she was underpaid temporary total disability benefits by respondent. Claimant maintains she sustained a 40 percent wage loss and 75 percent task loss, for a 57.5 percent work disability.

The issues for the Board's review are:

1. Does claimant's average weekly wage include wages earned in multiple part-time employment pursuant to K.S.A. 2009 Supp. 44-511(b)(7)?

2. What is the nature and extent of claimant's impairment and work disability?

FINDINGS OF FACT

Claimant initially began employment with respondent in 2008 as a substitute teacher assistant, which lasted 2-3 months. Claimant was then employed part-time by respondent as a teacher's aide from 2008 through August 2011. Claimant worked in the Head Start classroom with children aged 3 years to 5 years. Her main responsibility was assisting the classroom's teacher, including implementing assigned activities, preparing materials, and preparing the learning environment. A teacher's aide at times directly educated and gave instruction to students. Duties also included taking attendance, setting up classroom bulletin boards and decorations, supervising children at lunch/snack time and recess, cleaning and sanitizing toys, moving furniture, diapering, toileting, and dressing young children, using a computer, and attending various safety, training, and staff meetings. Claimant also acted as a bus aide while in this position, riding the bus with the children either before or after school. She would, as needed, assist children with their six-point seatbelt, assist with other issues, and impose discipline. This position required standing, walking, sitting, reaching, climbing, stooping, kneeling, crouching, and crawling, with occasional lifting and moving.

Claimant's average weekly wage with respondent was $226.68. Claimant worked up to 32 hours per week at respondent.

Claimant was simultaneously employed part-time with Boys and Girls Club of Hutchinson, Kansas, as both site director for the Lincoln Elementary after school program and as coordinator/director for Keystone Club. Claimant began employment with Boys and Girls Club in 2001. As site director for the Lincoln Elementary after school program,

claimant's responsibilities included coordinating and scheduling other employees, supervising employees, planning activities, using a computer, completing paperwork, maintaining a program calendar, and other logistics. Claimant supervised and educated children aged kindergarten through 6th grade. The after school program was a classroom setting that included additional physical activities. Claimant would lead group activities, get out and put away materials, serve food and snacks, supervise playground activity, load and unload children in vans and buses, and, at times, move furniture and dress younger children.

Although the majority of claimant's time during the school year at Boys and Girls Club was spent as site director, claimant also performed as coordinator/director of Keystone Club. During the summer, claimant primarily focused on Keystone Club since activities lasted an entire day. The Keystone Club is a community service club for leadership development for older children, aged 7th grade through 12th grade. Claimant would lead group activities, get out and put away materials, oversee the loading and unloading of buses, set tables and serve food, supervise outdoor activities, and complete paperwork. She would also attend meetings, develop and plan fundraising events, travel to conferences and accompany members on trips, oversee club meetings and election of officers, and work with administration to ensure resources are available to the Keystone Club.

Claimant earned one wage at Boys and Girls Club which included both positions. Claimant's average weekly wage with Boys and Girls Club was $346.15. Claimant worked up to 35 hours per week at Boys and Girls Club. Lance Patterson, claimant's supervisor at Boys and Girls Club, testified claimant worked approximately 20 hours per week as the Lincoln Elementary after school site director with the remaining hours as coordinator/director of Keystone Club.

On April 28, 2010, while working at respondent, claimant fell down a flight of stairs and landed on her left side. She timely reported the accident to respondent and was sent to the Hutchinson Clinic for medical treatment, where she was prescribed pain medication and physical therapy.

Claimant was referred to Dr. Sandra Barrett, a board certified physician specializing in physical medicine and rehabilitation, for an independent medical examination on September 19, 2011. Claimant presented with constant pain localized over the left flank. She indicated to Dr. Barrett that all everyday activities seem to increase her pain, which had a baseline pain rating of 5 out of 10. After giving a physical examination and reviewing claimant's medical records, Dr. Barrett diagnosed claimant with chronic myofascial low back pain. Recommendations included ongoing medication to modulate chronic pain, anti-inflammatory medication, and muscle relaxants.

Dr. Barrett imposed permanent restrictions, including: limit repetitive twisting and turning to an occasional basis; flexibility to change position particularly sit-to-stand as

needed; and a 20-pound weight limit for pushing and pulling. Using the AMA *Guides*,[1] Dr. Barrett rated claimant as having a 5 percent impairment to the whole person related to the work injury of April 28, 2010.

Claimant was subsequently evaluated by Dr. Barrett in July and again in August 2012, for ongoing pain management. Dr. Barrett testified that in her medical opinion, the permanent restrictions imposed upon claimant at the time of the September 19, 2011 independent medical examination remained unchanged. Dr. Barrett is authorized to provide pain management and conservative treatment for claimant.

On May 1, 2012, claimant was referred by her counsel to Dr. Paul Stein, a board certified neurosurgeon, for an independent medical examination. Claimant presented with left-sided lower back pain. After performing a physical examination and reviewing claimant's medical records, Dr. Stein diagnosed claimant with a soft tissue injury to the left flank with persistent pain from the left mid-thoracic region down to the lumbar area. He did not believe any further formal therapy likely to be beneficial, but he did note a physician should be authorized to monitor and provide pharmacological pain management for claimant. Dr. Stein recommended the following permanent work restrictions: no lifting more than 35 pounds with any single lift up to twice per day, 25 pounds more occasionally but no repetitive lifting; avoid lifting from below knuckle height and above chest height; avoid repetitive bending and twisting of the lower back; and have the opportunity to alternate sitting, standing, or walking on a half hourly basis as needed.

Dr. Stein assessed a 5 percent impairment to the body as a whole under DRE Lumbosacral Category II, using the AMA *Guides*. He further noted, absent any history of preexisting impairment, the entire 5 percent is related to the work incident of April 28, 2010.

Robert W. Barnett, Ph.D., a clinical psychologist, performed a task and wage loss evaluation of claimant at the request of her counsel on June 12, 2012. Dr. Barnett identified 26 unduplicated tasks claimant performed in the 15 years preceding the date of injury. Of those 26 tasks, Dr. Barnett identified 10 unduplicated tasks regarding claimant's employment with respondent. He identified 14 overall tasks related to claimant's employment with Boys and Girls Club of Hutchinson, and of those 14 tasks, Dr. Barnett found 10 to be duplicative to claimant's employment with respondent.

Dr. Barrett reviewed the task list prepared by Dr. Barnett. Of the 26 unduplicated tasks on the list, Dr. Barrett opined claimant was unable to perform 20 for a 76.9 percent task loss.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Stein also reviewed the task list prepared by Dr. Barnett. Of the 26 unduplicated tasks on the list, Dr. Stein opined claimant was unable to perform 19 for a 73 percent task loss.

On September 24, 2012, Steven Benjamin, a certified vocational rehabilitation counselor, provided an expert opinion of claimant's loss of work tasks and earnings at respondent's request. Mr. Benjamin identified 46 unduplicated tasks claimant performed in the 15 years preceding the date of injury. Of those 46 tasks, Mr. Benjamin identified 16 unduplicated tasks regarding claimant's employment with respondent. He identified 12 tasks performed by claimant at Boys and Girls Club of Hutchinson. Of the 12 tasks related to claimant's employment at Boys and Girls Club, it was Mr. Benjamin's expert opinion that 3 of those tasks were duplicative to claimant's employment with respondent.

Dr. Stein also reviewed the task list prepared by Mr. Benjamin. Of the 46 unduplicated tasks on the list, Dr. Stein opined claimant was unable to perform 21 for a 45.7 percent task loss.

Claimant testified respondent modified her position as teacher's aide after her injury to accommodate her restrictions. She stated she was then moved to child care before being terminated by respondent in August of 2011. Claimant continues to be employed by Boys and Girls Club, although she no longer acts as site director for the Lincoln Elementary after school program. The requirements for site director could not be accommodated with claimant's permanent restrictions, and she is now solely the coordinator/director of the Keystone Club. Her salary at Boys and Girls Club remains unchanged.

Both Dr. Barnett and Mr. Benjamin determined claimant has suffered a 39.6 percent wage loss, based upon information provided by claimant's counsel and respondent's counsel, respectively.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-511(b)(7) states:

> The average gross weekly wage of an employee who sustains an injury by accident arising out of and in the course of multiple employment, in which such employee performs the same or a very similar type of work on a part-time basis for each of two or more employers, shall be the total average gross weekly wage of such employee paid by all the employers in such multiple employment. The total average gross weekly wage of such employee shall be the total amount of the individual average gross weekly wage determinations under this section for each individual employment of such multiple employment.

K.S.A. 2009 Supp. 44-510e(a) states, in part:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

ANALYSIS

1. Does claimant's average weekly wage include wages earned in multiple part-time employment pursuant to K.S.A. 2009 Supp. 44-511(b)(7)?

Claimant suffered a single traumatic injury arising out of her employment with one of her two employers. In order to receive the benefit of the combined wages of multiple employers, K.S.A. 2009 Supp. 44-511(b)(7) requires a worker to sustain an injury by accident arising out of and in the course of multiple employment. It is impossible for a single traumatic injury to arise out of multiple employment. Based upon the plain language of the statute, only an injury by repetitive trauma can arise out of multiple employment.

Historically, Kansas courts have found that single traumatic injuries suffered by an individual engaged in multiple part-time employment of the same or very similar nature require the combination of wages earned from both employers. In *Kinder v. Murray & Sons,*[2] the claimant jumped off some steps while working for one employer and the Court allowed the average weekly wage to be based on wages received from claimant's other similar employment.

The problem in applying *Kinder* is that the Court relied on the judicially created concept that the Act be interpreted liberally in favor of the worker. The Court in *Kinder* wrote:

> 'The goal of workers' compensation is to restore earning power lost as a result of injury. *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 194, 558 P.2d 146 (1976).' *McMechan v. Everly Roofing, Heating & Air Conditioning, Inc*., 8 Kan. App. 2d 349, 351, 656 P.2d 797, *rev. denied* 233 Kan. 1092 (1983). In furtherance of that goal, this court has long adhered to a rule of liberally construing the workers compensation act in favor of the worker. A 1939 opinion contains this statement: '[T]his court has frequently said that the workmen's compensation act should be liberally construed to effectuate its purposes. (*Roberts v. City of Ottawa*, 101 Kan. 228, 165 Pac. 869; *Palmer v. Fincke,* 122 Kan. 825, 253 Pac. 583*; Rush v. Empire Oil & Refining Co.*, 140 Kan. 198, 200, 34 P.2d 542.)' *Chamberlain v. Bowersock Mills & Power Co.*, 150 Kan. 934, 944, 96 P.2d 684 (1939). More recently, in *Nordstrom v. City of Topeka*, 228 Kan. 336, 613 P.2d 1371 (1980), this court stated:

[2] *Kinder v. Murray & Sons Const. Co., Inc.,* 264 Kan. 484, 485, 957 P.2d 488, 490 (1998).

> 'The court is firmly committed to the rule of liberal construction of the workmen's compensation act in order to award compensation to the workman when it is reasonably possible to do so.' Syl. ¶ 2.
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> 'When a workmen's compensation statute is subject to more than one interpretation, it must be construed in favor of the workman if such construction is compatible with legislative intent.' Syl. ¶ 3.

In interpreting a statute, the fundamental rule is the intent of the legislature, where it can be ascertained, governs. When a statute is plain and unambiguous, we will not speculate as to the legislative intent behind it or read such statute so as to add something not readily found in the statute. *State v. Lawson,* 261 Kan. 964, 966, 933 P.2d 684 (1997). 'When the legislature revises an existing law, it is presumed that the legislature intended to change the law as it existed prior to the amendment.' *State v. Clint L.,* 262 Kan. 174, Syl. ¶ 2, 936 P.2d 235 (1997).

Bearing in mind these construction rules and the principle that the award ought to approximate the injured worker's earning power, which was impaired because of the injury, we turn to the pertinent portion of the statute. . .[3]

In 1987, the legislature stated their intent to stop construing the Act liberally in favor of the worker by adding the language contained in K.S.A. 1987 Supp. 44-501(g), which states:

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.[4]

In *Bergstrom v. Spears Mfg. Co.,*[5] our Supreme Court stated:

> The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007). The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language. *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 785, 189 P.3d 508 (2008).

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[3] 264 Kan. 493-94. [Emphasis added.]

[4] 1987 *Session Laws of Kansas,* Ch. 187 (H.B. 2186).

[5] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676, 678 (2009).

> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).[6]

In *Casco v. Armour Swift-Eckrich*, the Supreme Court wrote: "A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute."[7] In *Casco* and *Bergstrom,* the Court has shifted the construction of workers compensation statutes from liberal to literal.

Claimant did not suffer an injury arising out of and in the course of multiple employment. She suffered an injury arising solely from her employment with respondent. As such, only wages earned while working for respondent should be considered in determining claimant's average weekly wage. Claimant's average weekly wage is $226.68.

2. Nature and Extent of Disability

Both vocational experts found that claimant's average weekly wage attributable to the respondent was $226.68. At the time of the regular hearing, claimant was still employed with the Boys and Girls Club making $1,500.00 per month. This results in a current average weekly wage of $346.15. In order to receive work disability under K.S.A. 2009 Supp. 44-510e(a), claimant must suffer a wage loss greater than 10 percent of her average weekly wage. As claimant is currently earning more than the gross average weekly wage she earned with respondent, she is not entitled to work disability.

CONCLUSION

Claimant's average weekly wage is limited to her employment with respondent and does not include wages earned in multiple part-time employment pursuant to K.S.A. 2009 Supp. 44-511(b)(7). Clamant is not entitled to work disability. Claimant is entitled to a 5 percent permanent partial impairment based upon the ratings provided by Drs. Stein and Barrett.

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[6] 289 Kan. 607-08.

[7] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 521, 154 P.3d 494, 504 (2007), citing *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 15, 81 P.3d 425 (2003).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated April 15, 2013, is reversed in part, but affirmed as to functional impairment.

Claimant is entitled to 5.29 weeks of temporary total disability compensation at the rate of $151.13 per week or $799.48 followed by 20.75 weeks of permanent partial disability compensation at the rate of $151.13 per week or $3,135.95 for a 5 percent work disability, making a total award of $3,935.43.

As of September 12, 2013, there would be due and owing to the claimant 5.29 weeks of temporary total disability compensation at the rate of $151.13 per week in the sum of $799.48, plus 20.75 weeks of permanent partial disability compensation at the rate of $151.13 per week in the sum of $3,135.95, for a total due and owing of $3,935.43, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of September, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENTING OPINION

The undersigned Board Member respectfully dissents from the majority's ruling that although claimant had multiple employments, only wages claimant earned while employed by respondent should be considered in determining claimant's average weekly wage. The majority reasoned that claimant sustained her injury while working for respondent, not from her multiple employments. The majority ruled that where an injured worker has multiple

employments, under K.S.A. 2009 Supp. 44-511(b)(7) average weekly wage is based on the multiple employments only if the personal injury by accident arose out of the multiple employments. The majority then rationalized that *Bergstrom* (citation omitted) requires K.S.A. 2009 Supp.44-511(b)(7) to be interpreted literally.

A worker can only sustain a traumatic injury arising out of and in the course of one employment. In such instances, the injured worker is precluded from receiving permanent partial disability benefits based upon his or her multiple employments. Thus, the majority's interpretation of K.S.A. 2009 Supp. 44-511(b)(7) would mean that in all claims where the injured worker sustains a traumatic injury, his or her average weekly wage would be limited to the wages they earned on the job where the traumatic injury occurred.

Workers who sustain a repetitive injury by accident (Old Law) or an injury by repetitive trauma (New Law) would, in most instances, have their average weekly wage limited to the wages they earned in the job where they sustained the repetitive injury. In order to use the wages from all of their multiple employments to calculate average weekly wage, those injured workers would have to prove their repetitive injury arose out of and in the course of all of their multiple employments. The majority's ruling has a chilling effect by limiting dramatically the average weekly wage and thus the permanent partial disability benefits of virtually all injured workers with multiple employments. In the present claim, claimant's average weekly wage is reduced by $346.15 per week, and in turn her total amount of permanent partial disability payments were reduced by more than 50 percent.

In *Schrag,*[8] the Board dealt with this very issue and came to a conclusion that is contrary to that of the majority in the current claim. Schrag held multiple employments as a truck driver and injured his foot while employed by Waggoners. The Board held:

> While claimant was employed with respondent, he also had the opportunity to work for other employers, as a truck driver and delivering for those other employers. Here, claimant's jobs for the other employers were similar to the work performed for respondent. Pursuant to K.S.A. 2006 Supp. 44-511(b)(7), the income earned by claimant with the other employers will also be used to calculate the wages claimant was earning on the date of accident.

The majority should have decided this case using the legal analysis the Board recently used in *Adelhardt*,[9] where the Board stated:

> (1) Claimant's AWW is $330.83. Claimant's argument that the wages of claimant's part-time position for respondent and her wages at her part-time position at SADVC

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[8] *Schrag v. Waggoners, Inc.,* No. 1,035,570, 2009 WL 2864497 (Kan. WCAB Aug. 17, 2009).

[9] *Adlebardt v. Mennonite Friendship Manor,* No. 1,055,819 2013 WL 862046 (Kan. WCAB Feb. 12, 2013).

> should be combined to compute the AWW is without merit. The multiple employment wage aggregation authorized by K.S.A. 2010 Supp. 44-511(b)(7) applies only to workers employed in two or more part-time jobs which are the same or very similar in nature. In this claim, claimant was employed part-time for respondent and part-time for SADVC, however, the jobs are not the same or similar in nature.

Instead, the majority has decided that in the vast majority of claims where an injured worker has multiple employments and sustains a work-related injury arising out of and in the course of one employment, he or she will be penalized because of the nature of the injury sustained.

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